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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 199

THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, a public corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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July, 1947.

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v.

FEDERAL POWER COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The Central Nebraska Public Power and Irrigation District, a public corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled case on April 18, 1947.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 263-272) is reported in 160 F. (2d) 782.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on April 18, 1947 (R. 273). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act, 49 Stat. 838, 860, 16 U. S. C. 825*l* (b) and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED.

Section 10(e) of the Federal Power Act of June 10, 1920, c. 285, 41 Stat. 1063, 1069 as amended by the Act of August 26, 1935, c. 687, Title II, 49 Stat. 838, 843, 16 U. S. C. 803(e) provides in part:

> "That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require . . . Provided further, that licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; . . ."

QUESTIONS PRESENTED.

1. Whether a municipal licensee under the Federal Power Act is entitled to exemption from the payment of annual charges under Section 10(e) of that Act by reason of the fact that all its sales of power are made pursuant to state statutes authorizing such sale and requiring all excess of revenues received above costs to be returned to consumers by way of lower rates or increased services.

2. Whether a municipality upon acceptance of a license issued pursuant to the Federal Power Act is thereafter estopped to contest the constitutionality of Section 10(e) of the Federal Power Act.

STATEMENT.

Petitioner, The Central Nebraska Public Power and Irrigation District is a public corporation and political subdivision of the State of Nebraska, organized pursuant to Chapter 70, Article 7, Nebraska Compiled Statutes, Supp., 1941, as amended by Article 6, Chapter 70, Revised Statutes 1943. Petitioner is a municipality and licensee under the Federal Power Act (R. 220-221).

Petitioner operates an irrigation project on the Platte River and its tributaries in Nebraska. Under license from the Federal Power Commission, Petitioner operates hydroelectric generating plants and electric transmission systems in connection with its irrigation project. Since May 1, 1940, petitioner, the Platte Valley Public Power and Irrigation District and the Loup River Public Power District have, by agreement, interconnected transmission lines and pooled their power (R. 59). The power thus pooled is sold at wholesale for resale by the purchasers to the ultimate consumer. Revenues received from such sales are distributed among the parties to the agreement in accordance with prescribed formulae (R. 73, 89). Under this agreement petitioner realized $106,320.01 in 1942 and $263,905.53 in

1943 (R. 235) after payment of operating expenses and provision for interest, depreciation and accrual for bond redemption premiums.

The Nebraska statute under which petitioner is organized requires that rates for services shall be so fixed as to confer upon and distribute among the users and consumers of the services the benefits of any profitable operation and conduct of its business.[1] The effect of this limitation is to preclude the use of any excess of revenue over costs for any purpose other than lowering rates or increasing services rendered by petitioner. In accordance with this limitation, the net balances for 1942 and 1943 were set aside by petitioner for future bond redemption (R. 236-237). The reduction in debt and fixed charges resulting from the redemption of indebtedness of the facilities is one of the methods by which rate reduction may be made possible by a municipality, and the profitable operation thus conferred upon the users and consumers.

In April 3, 1943, petitioner filed with the Commission application for exemption from annual charges for the year 1942 asserting that its sales of electric power had been made to the public without profit, and that such sales constituted a use of the power by petitioner, a municipality, for municipal purposes within the meaning of the exempting provisos of Section 10(e) of the Federal Power Act (R. 166-178, 233-234). Similar application for exemption

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[1]Section 70-713 C. S. Supp., 1941, provides in part: "Rates and Charges, Powers of Board of Directors, Lease or Alienation of Franchises and Physical Properties Prohibited, a. The board of directors of any district organized under this Act, shall have the power and be required to and shall fix, establish and collect adequate rates, tolls, rents and other charges for electrical energy, water service, water storage and for any and all other commodities, services, or facilities sold, furnished or supplied by the district, which rates, tolls, rents and charges shall be fair, reasonable, non-discriminatory, and so adjusted as, in a fair and equitable manner, to confer upon and distribute among the users and consumers of commodities and services furnished or sold by the district, the benefits of a successful and profitable operation and conduct of the business of the district."

was made by petitioner on April 3, 1944, covering the year 1943 (R. 207-219, 233-234). Both applications were denied by the Commission and annual charges were assessed in the amount of $3,922.15 for 1942 (R. 185) and in the amount of $7,344.10 for 1943 (R. 222). Petitioner requested rehearing on the applications (R. 186, 222). Rehearing was granted and by order of the Commission hearings on the applications were consolidated in a single proceeding (R. 228-229). Thereafter, the Commission, two Commissioners dissenting, filed an opinion denying the applications for exemption (R. 233-257), and entered an order requiring payment of the annual charges (R. 257-259). The Commission refused to consider the additional contention made by petitioner that Section 10(e) of the Federal Power Act conferring upon the Commission authority to fix reasonable annual charges to be paid by licensees was unconstitutional (R. 242 n. 6).

On petition to review the Commission's order, the court below held that petitioner's operations were such as were not entitled to exemption under Section 10(e) of the Federal Power Act. In reaching this conclusion, the court held that the receipt of revenues in excess of costs constituted "profits" from petitioner's sales of power to the public and that such profits precluded exemption under the proviso of Section 10(e) of the Federal Power Act exempting licensees from annual charges to the extent power is sold to the public "without profit." The court further held that the sale of power by a municipality did not constitute a use of the power for municipal purposes under the further proviso of Section 10(e) of the Federal Power Act exempting licensees from annual charges to the extent power is used by a municipality for municipal purposes. The court further held that the petitioner is estopped from asserting that Section 10(e) is unconstitutional. The court, accordingly, sustained the order of the Commission (R. 262-272).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred—

(1) In holding that sales of power by a municipal licensee producing an excess of revenues over costs, where such excess revenues may be used only for the benefit of consumers in the form of lower rates or increased service, are not sales to the public without profit within Section 10(e) of the Federal Power Act;

(2) In holding that the sale of power by a municipality is not a use of such power for municipal purposes within Section 10(e) of the Federal Power Act;

(3) In holding that a licensee under the Federal Power Act is estopped to challenge the constitutionality of Section 10(e) of that Act which gives authority to the Federal Power Commission to assess reasonable annual charges against such licensees;[2]

(4) In failing to hold that the power conferred upon the Federal Power Commission by Section 10(e) of the Federal Power Act to assess annual charges against licensees amounts to an unconstitutional delegation of legislative powers reserved to Congress by Article I, Section 1, of the Constitution;

(5) In failing to hold that the power conferred upon the Federal Power Commission by Section 10(e) of the Federal Power Act to assess annual charges against licensees amounts to an unconstitutional delegation of the power

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[2] It is apparent that in so holding the court below did not reach the important questions going to the Constitutional validity of the Section. The petitioner, however, submits that this Court has the power in this case to rule upon the constitutional questions regarding Section 10(e) of the Federal Power Act. See: *Scott* v. *Sanford*, 19 How. 393, 428-429; *Cardillo* v. *Liberty Mutual Insurance Company*, No. 265 October Term 1946 decided March 10, 1947, 67 Sup. Ct. 801. The grave importance of these questions in the administration of the Act and their implications upon the operations of all licensees require that they be settled by a decision of this Court.

reserved to Congress by Article I, Section 8, of the Constitution to lay and collect taxes;

(6) In sustaining the order of the Federal Power Commission.

REASONS FOR GRANTING THE WRIT.

I.

Two questions are presented as to the meaning of the exempting provisos of Section 10(e) of the Federal Power Act which are of importance to all publicly owned power developments licensed under that Act and which have not been, but should be, settled by this Court. The first of these relates to the proviso granting exemption to the extent power is sold to the public "without profit" and the second deals with the exemption provided where power is used by the municipality for municipal purposes.

The decision below is the first by any court dealing with the application of the exemptions for state and municipal licensees from annual charges assessed by the Federal Power Commission under Section 10(e). It is of grave importance to such licensees in the conduct of their operations that the questions raised in this case, which led to two dissenting opinions in the Federal Power Commission, should be set at rest by decision of this Court.

Annual charges assessed by the Federal Power Commission against the licensee are based upon a flat charge per horsepower of installed authorized capacity, plus a flat charge per thousand kilowatt hours of energy generated in the year.[3]

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[3] Article 15 of petitioner's license reads as follows:

"Article 15. Subject to the provisions of Section 10(e) of the Act, including the proviso relating to the exemption from payment of annual charges of municipalities distributing power from a licensed project to the public without profit, the Licensee shall pay to the United States as reimbursement for the costs of administration of Part I of the Act, an annual charge of one (1) cent per horsepower on 96,500 horsepower,

1. The first question relates to that part of Section 10(e) which provides that a license issued to a State or municipality for the generation, transmission or distribution of power shall be issued and enjoyed without charge to the extent such power is "sold to the public without profit." The court below interpreted the phrase "without profit" in the light of what it termed "traditionally the concept of an entity doing business such as producing or selling."[4] In the Court's view, the exemption would not apply if, at the close of an annual accounting period, the accounts of the municipality showed a net balance of revenue over costs irrespective of the fact that the effect of the applicable State legislation is to require the municipality to return any net balance to its consumers through increased service or lower rates. We must submit that this interpretation rests on a misconception of the intent and purposes of the exemption and that the court, by reason of this misconception, erroneously interpreted the proviso respecting sales "without profit".

Profit, in the traditional and usual sense, is the measure of return to capital investors in private enterprise and ordinarily consists of the earnings beyond costs. As such they represent a return to the investor for the risk assumed. This concept cannot be applied to the situation involving a publicly owned power development required

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authorized installed capacity, plus two and one-half (2½) cents per thousand kilowatt-hours for energy generated by the project during the preceding fiscal year ended June 30. Payment by the Licensee of such annual charges shall be made to the United States within 30 days from date of statement rendered by the Commission. A penalty may be imposed pursuant to the provisions of Section 17 (b) of the Act for delinquency in payment." (R. 265)

[4] The Court said: "Traditionally the concept of an entity doing business such as producing and selling includes as one of the incidents that it is making profits or losing money in given periods, and study of the Nebraska law governing the objects, organization and functioning of the petitioner in this case shows plainly that the concept including that aspect was constantly in the legislative mind." (R. 268)

to return any net balance to its consumers in the form of lower rates or increased services.

The return in such a case is not a return to the entrepreneur but to the customer. This distinction has long been recognized by this Court in cases of publicly owned facilities. *Springfield Gas & Electric Company* v. *City of Springfield,* 257 U. S. 66; *Puget Sound Power and Light Company* v. *City of Seattle,* 291 U. S. 619.

The intent of Congress in enacting the exemption contained in Section 10(e) was to exempt from charges those State and municipal licensees which in fact operated to confer the benefit of water power development on the consumer rather than to earn a return of private profit. Representative Esch, Chairman of the Select Water Power Committee speaking of the exempting language found in Section 10(e) as it was presented in the Conference Report, H. Rept. No. 910, 66th Congress, Second Session said:

> "Under the provisions of this bill no charge is levied upon a municipality or any other governmental agency or the state itself for power developed by dams constructed by such state or municipality, *and when the power is for public utility purposes and not sold for profit.* The only sources of a charge would be upon the agency, private in its character, which furnished power to public utilities or for its own use." (Emphasis supplied).[5]

Again Senator Nelson of Minnesota, the floor manager of the bill, speaking in regard to one of the earlier drafts of the exemption provision, said:

> "We provide in this amendment that all expenses which the Federal Government incurs in connection with waterpower development constructed by private capital shall be reimbursed to the Federal Government . . . Beyond that we leave the property of the State to the State, with authority in the State to determine whether a charge shall be imposed or a reduction of

[5] May 4, 1920, 59 Cong. Rec. 6524.

rates effected . . . The Federal Government is not giving away its property; it is simply consenting that the people of the several States may use their own without paying tribute to the Federal Government."[6]

It thus appears that Congress intended to impose the annual charges upon the sale of power that results in a private profit made at the expense of the consumer. This intent of Congress is clearly embodied in the purposes stated in Section 10(e) for the assessment of annual charges.

The Section in part provides that licensees shall pay annual charges "for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges . . . "

This statement of purposes is consistent only with the imposition of charges where earnings result in private profit. These purposes are not fulfilled by the assessment of charges upon a municipality whose use of power revenues is limited to lowering rates and increasing service.

The construction given to the exemption by the court below wholly renders ineffectual the expressed purposes of the exemption and the intent of Congress in its enactment. As construed below, the exemption is merely a function of accounting. Only if revenues exactly balance expenditures for costs or if operations result in a net loss would the State or municipality be entitled to claim exemption. The court conceded that this construction makes it "practically impossible" to operate in a manner so as to obtain exemption.

The Federal Power Commission has not been consistent in the application of the construction adopted below. In an effort to avoid the unworkable result implicit in the deci-

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[6] January 12, 1920, 59 Cong. Rec. 1430-1431.

sion below, the Federal Power Commission was led in one case to modify the words of the statute so as to read *substantially* without profit.[7] That decision of the Federal Power Commission is inconsistent with the result reached here.

The importance of the construction of the term "without profit" adopted below is readily apparent. Rates must be fixed for a period in advance. As fixed, the rates must reflect provision for possible contingencies beyond estimated costs. If none of the contingencies occur, the rates will necessarily return a net balance of revenues over costs of operation for a given period. If a net balance in any amount renders the licensee liable for the assessment of charges, an effort by the licensee to operate so as to qualify under the exemption would require operations at a loss thus jeopardizing the financial soundness of its entire project.

2. Section 10(e) of the Federal Power Act contains the further provision that licenses issued under that Act to States or municipalities shall be issued and enjoyed without charge to the extent such power is "used by such State or municipality for State or municipal purposes." The court below held that the use of power for a municipal purpose, within the meaning of the statutory provision, could only result from the municipality retaining the power (R. 272). This construction cannot be reconciled with the definitions of "municipality" and "municipal purposes" contained in Section 3(7) and Section 3(9) of the Federal Power Act.

Section 3(7) of the Federal Power Act defines municipality as including a city, county, irrigation district or other political subdivision of the State competent under the laws of the State to carry on the business of developing, transmitting, utilizing, or distributing power. Section 3(9) of the Federal Power Act defines municipal purposes as "all purposes within the municipal powers as defined by the

[7] In the matter of Crisp County, Georgia, Project 658 Order dated April 18, 1939.

constitution or laws of the State or by charter of the municipality." Petitioner is a municipality within the meaning of the Federal Power Act and has been so found by the Commission (R. 221). The statute of Nebraska under which petition is organized confers among others the power to sell the power generated.[8]

In the view of the court below the word *used* found in the exempting provision must be limited to a use by way of consumption. The effect of the holding is that the proviso operates only when the power is consumed by the muncipality for its own uses. Under this holding, if the power is consumed by others than the licensee, no claim for exemption on ground of use for municipal purpose can be made. This interpretation denies, in spite of the broad definition of "municipal purposes" in Section 3(9) of the Federal Power Act, that a municipal purpose may be other than a consumption of the power by the municipality itself. We submit that the broad terms of the Act demonstrate this limited construction to the erroneous. A municipality within the definition of Section 3(7) of the Federal Power Act may be a political subdivision of the state which was created solely for the generation and transmission of power, incapable of consumption itself except by way of nominal plant expenditure. To hold that nominal plant expenditure constitutes the only Municipal use by such a municipality,

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[8] Section 70-706, C. S. Supp., 1941, as amended by Act of May 27, 1943, Chapter 146, Statutes of Nebraska 1943 provides in part: "(2) Such a district may own, construct, reconstruct, purchase, lease, otherwise acquire, improve, extend, manage, use or operate any electric light and power plants, lines and systems, either within, beyond or partly within and partly beyond the boundaries of the district, and may engage in or transact business or enter into any kind of contract or arrangement with . . . (d) any body politic or corporate for any of the purposes above mentioned or for or incident to the exercise of any one or more of the foregoing powers, or for the generation, distribution, transmission, sale or purchase of electrical energy for lighting, power, heating and any and every other useful purpose whatsoever, and for any and every service involving, employing or in any manner pertaining to the use of electrical energy, by whatever means generated or distributed, . . ."

is to take an unrealistic view of the purposes and objectives of modern public power developments.

The court below felt bound to give the exemption provided for power used for municipal purposes and the exemption provided for sales to the public without profit such a construction as would grant them mutually exclusive application. The necessity for this conclusion does not appear in the terms of the Act. It rather appears that the purpose and intent of the Act require the broadest possible construction which will aid in the development of natural water power resources by public agencies. Nor are the two provisions contradictory so as to entitle the court to ignore the plain language. *United States* v. *Standard Brewery*, 251 U. S. 210, 217.

II.

1. We further submit that the court below erroneously held that petitioner was estopped to challenge the constitutionality of the grant of power to the Federal Power Commission contained in Section 10(e) of the Federal Power Act to assess "reasonable annual charges" against licensees. The court held that a licensee may not urge, as an alternative ground to exemption under the provisos of the Section, that the power conferred in the Section to assess the charges is unconstitutional.

Seemingly the court below was of opinion that a licensee under the Federal Power Act, having applied for and accepted a license containing provision for the payment of annual charges in accordance with Section 10(e) of that Act, cannot thereafter urge the unconstitutionality of that Section of the Act. The effect of the holding is to deny completely an opportunity to challenge the constitutionality of the power to assess annual charges granted in the Section.

Under prior decisions of this Court petitioner could not have raised the issue of constitutionality without applying for and accepting a license. *Smith* v. *Cahoon*, 283 U. S. 553. The mere issuance of the license conditioned upon the payment of annual charges levied under Section 10(e) did not

raise a justiciable controversy since there was only the apprehension of injury to petitioner. *Lehon* v. *City of Atlanta*, 242 U. S. 53, 56; *Cf. Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. For the same reason, the petitioner would be precluded from resort to declaratory judgment on the questions. *Cf. Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 340. Petitioner's opportunity to contest the constitutional basis for the power to assess annual charges conferred upon the Federal Power Commission arose only with the assessment of charges against it. The decision of the court below is thus of importance to all licensees under the Federal Power Act. If permitted to stand, there may be no challenge made to the constitutional basis of the Act, since without a license there is no controversy to support an action and after issuance of the license and assessment of charges estoppel will be invoked.

Moreover, the power to issue licenses conferred upon the Federal Power Commission in Section 4 of the Federal Power Act is separable from Section 10(e) by the terms of Section 319. The acceptance of a benefit under Section 4, therefore, is not such a benefit which precludes a challenge to the separable provisions of Section 10(e). *Cf. Champlin Refining Company* v. *Corporation Commission of the State of Oklahoma*, 286 U. S. 210.

2. Section 10(e) of the Federal Power Act confers upon the Federal Power Commission power to fix reasonable annual charges payable by licensees "for the purpose of reimbursing the United States for the costs of the administration of this Part; and for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves . . . " We contend that the exaction for this stated purpose amounts to a tax. *United States* v. *Butler*, 297 U. S. 1-88; *United States* v. *La Franca*, 282 U. S. 568, 577. There is no relationship between annual charges and the cost of any acts or duties the Commission performs in

respect to the license. Such charges are not related in any way to the value of any services rendered the licensee. The power conferred, therefore, is urged as an unconstitutional delegation of the power of Congress to collect taxes.

3. We further urge that, if the power conferred is regarded as such as may be properly delegated to an administrative agency, the standards laid down in the Federal Power Act for the exercise of the power are so indefinite as to amount to an unconstitutional delegation of the power reserved to Congress to enact legislation. The only admonition or criteria contained in the Act is that the charges must be reasonable. There exists no standard by which the reasonableness of the assessments of the Federal Power Commission may be measured. The exercise of the power therefore, may not be reviewed or measured. The licensee is left to an indefinite liability dependent upon the discretion of the Federal Power Commission.

CONCLUSION.

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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